No. 3960 No. 3977

In The United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of
PATTERSON - MACDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA, *Petitioner*,
vs.
F. E. BURNS, W. C. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson-MacDonald Shipbiulding Company, a Corporation, Bankrupt, *Respondents*.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia, *Appellants*,
vs.
F. E. BURNS, W. C. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, *Appellees*.

BRIEF OF RESPONDENTS AND APPELLEES

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Brief of Respondents and Appellees

MOTION TO DISMISS APPEAL

The same question presented by the petition to revise is also brought up by an appeal, and it has been stipulated that both proceedings may be con-

sidered and disposed of together. The appellees now move that this appeal be dismissed, for the reason that this court is without jurisdiction to entertain the same, and appellant is in default under Rule twenty-four of this court.

ARGUMENT UPON MOTION TO DISMISS APPEAL

The order appealed from confirms an order of the referee making an allowance to A. M. MacDonald for services rendered and expenses incurred by him at the request of the trustee in connection with the administration of the estate and for its benefit. Such an order relates solely to a proceeding in bankruptcy of an administrative character and is not appealable under any of the provisions of the Bankruptcy Act. It does not constitute the allowance or rejection of a claim under Section 25-a (3).

W. J. Davidson & Co. v. Friedman, 140 Fed. 853, (C. C. A. 6th Cir.)

Ohio Valley Bank Co. v. Switzer, 153 Fed. 362, (C. C. A. 6th Cir.)

The order is subject to review in matter of law only under Section 24-b, and this remedy excludes jurisdiction of an appeal.

W. J. Davidson & Co. v. Friedman, supra.

Ohio Valley Bank Co. v. Switzer, supra.

Kinkead v. J. Bacon & Son, 230 Fed. 362, (C. C. A. 6th Cir.)

Petition of Baxter, 269 Fed. 344, (C. C. A. 6th Cir.)

Yaryan Rosin & Turpentine Co. v. Isaac, 270 Fed. 710, (C. C. A. 5th Cir.)

See also:

In re Loving, 224 U. S. 183, 56 L. Ed. 725.

In re Creech Bros. Lbr. Co., 240 Fed. 8, (C. C. A. 9th Cir.)

Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, (C. C. A. 9th Cir.)

In re Mueller, 135 Fed. 711, (C. C. A. 6th Cir.)

Kirsner v. Taliaferro, 202 Fed. 51, (C. C. A. 4th Cir.)

Furthermore, the appellant has failed to file any brief in support of its appeal, as required by Rule twenty-four.

MOTION TO DISMISS PETITION FOR REVIEW

Respondents move that the petition for review be dismissed, because petitioner is not entitled to maintain the same.

ARGUMENT UPON MOTION TO DISMISS PETITION FOR REVIEW

(a) When the petitioner's claim was originally presented to the referee in the bankruptcy proceedings, it was objected to by the trustee on various grounds, one being that the claim was unliqui-

dated. This ground of objection was confessed, and liquidation proceedings were instituted upon application to and direction of the district judge, who referred the matter to a special master. These liquidation proceedings have resulted in a finding and report by the special master, that petitioner has no claim, and that instead of the bankrupt being indebted to the claimant, it has overpaid the claimant $312,602.48. The master's report has been confirmed by the district court, and an appeal from this decision has been taken. The determination of whether the petitioner is a creditor of the bankrupt involves questions of fact which cannot be considered in this proceeding.

Whitla & Nelson v. Boyd, 213 Fed. 587, (C. C. A. 9th Cir.)

In re Henry Siegel Co., 216 Fed. 943 (p. 946) (D. C. Mass).

Chatfield et al. vs. O'Dwyer, 101 Fed. 797, (C. C. A. 9th Cir.)

Gaudette v. Graham, 164 Fed. 311, (C. C. A. 9th Cir.)

Kenova Loan & Trust Co., v. Graham, 135 Fed. 717, (C. C. A. 4th Cir.)

In re Ann Arbor Machine Corp., 274 Fed. 24, (C. C. A. 6th Cir.)

Upon the record as it stands in this case, the petitioner is not a creditor, and is therefore not a party aggrieved who is entitled to bring a petition under Section 24-b of the Bankruptcy Act. (See respondents' answer, paragraph I).

(b) Even if petitioner be recognized as a party aggrieved, it cannot maintain this proceeding unless it shows that it has made a demand upon the trustee to review the order and he has refused to do so, and it has then upon motion been granted permission by the court to proceed in its own name.

In re Mexico Hardware Co., 197 Fed. 650, (D. C. New Mexico).

Shatfield et al. vs. O'Dwyer, 101 Fed. 797, (C. C. A. 8th Cir.)

In this case, no request was made upon the trustee to act, nor any permission secured by the petitioner, granting it leave to bring these proceedings in its own name. The petitioner, forseeing this objection, has endeavored to meet it by the allegations of paragraph twelve of its petition, but these allegations, even if true, are insufficient to excuse its failure to follow the proper procedure.

In re Mexico Hardware Co., supra.

The reasons for the application of this rule are particularly strong in the present case, where petitioner has been twice determined to be not a creditor but a debtor of the estate. It has held up this order since the ~~23rd of August, 1922~~ 21st Oct 1921, and if it is entitled to maintain this proceeding, it can likewise interfere in its own name with every administrative step in the bankruptcy proceedings. To permit it to do this would be contrary to the salutary principles announced in the above cases.

ARGUMENT ON PETITION TO REVISE

We shall consider first the allowance to respondent Fowler, which is wholly separate and distinct from the allowances to respondents Burns and Dawson, although made at the same meeting and included in the same order.

On July 31st, 1920, the petitioner filed a large claim against the bankrupt with the referee, to which the trustee made written objection on various grounds, one of which was that the claim was unliquidated. Thereupon petitioner applied to Judge Neterer pursuant to Section 63-b of the Bankruptcy Act, for an order directing the manner of liquidating said claim. On October 12th, 1920, the matter was referred to Honorable C. R. Hawkins, as special master, he being the same person as the referee before whom the bankruptcy proceedings were and still are pending.

Prior to the bankruptcy, on March 31st, 1919, the bankrupt and this petitioner had entered into an agreement, which, among other things, provided as follows:

> "As regards certain questions of stores and equipment hitherto in dispute (such as awnings, canvas covers, certain deck equipment, engine room tools, compasses, binnacles, sidelights, etc.), it is now agreed that the question whether the cost of these items, or any of them, is to be paid by the owner or contractor, shall be decided by reference to Mr. Fowler, Lloyd's

Surveyor in Seattle, whose decision shall be binding upon both parties."

The items mentioned in this agreement had already been submitted to Mr. Fowler by the parties, and the controversy was under consideration by him at the time of the adjudication. (Respondents' answer, paragraph III). During the course of the liquidation proceedings before the special master, both the petitioner and the trustee appeared before Mr. Fowler and continued the arbitration previously begun, submitted evidence in support of their respective claims, and participated in the proceedings until their final conclusion. (Record, p. 16). Mr. Fowler subsequently rendered an award finding that certain of the items in dispute should be paid for by the bankrupt, and certain others by the petitioner. This award was presented to and adopted by the special master in passing on petitioner's claim, as conclusive on the matters covered thereby, and no other evidence was offered as to such items.

The referee certifies that the services of Mr. Fowler were rendered to and received by the trustee, and all parties, even the petitioner, admitted that the allowance made to him was reasonable compensation for what he had done. (Record p. 14; Record on Appeal, p. 42). No objection was ever made by the petitioner to the arbitration by Mr. Fowler (Record on Appeal, p. 39). Mr. Fowler rendered his services in good faith, and they were of a character calculated to benefit the estate, be-

cause the proceedings provided an informal way of arriving at a just decision of matters in dispute between the parties, involving questions of a technical character relating to ship construction.

> "The allowance of necessary expenses in the bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof."
>
> *United States v. Ward*, 257 Fed. 372 at p. 377 (C. C. A. 8th Cir.)

The petitioner has no standing in these bankruptcy proceedings to entitle it to complain of this allowance. It has not up to the present shown itself to be a creditor that can be recognized under the Bankruptcy Act. Its claim has been in litigation for over two years, and has been disallowed by two judges, and most of the issues in which it has joined on submission to the arbitrators have been decided against it. Even if it has a claim, it is an unliquidated one, and therefore, for the present, not provable so as to entitle it to participate in the proceedings in bankruptcy.

> "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may *thereafter* be proved and allowed against his estate."
>
> Bankruptcy Act, Section 63-b.

Furthermore, the petitioner should be held estopped to question what it has so actively and

expressly joined in and encouraged. By its written agreement with the bankrupt, it submitted this dispute as to certain questions of a technical character to Mr. Fowler, Lloyd's Surveyor at Seattle, a man specially qualified to pass upon such questions, solemnly agreeing to accept his decision as binding. It went forward with the submission both before and after the adjudication and reference to the special master, presented its evidence, argued its case, proceeded to an award without objection, and then being dissatisfied therewith, and unwilling to pay the arbitrator his fees, for the first time raised the point that the proceeding was void. Such an attitude and claim now is extraordinary. Whoever else, as a party in interest to the bankruptcy, might be entitled to question the employment of an arbitrator by the trustee, surely this petitioner has no standing to do so. Yet in the face of all this, it is contended that the arbitration proceedings before him were void.

It should be borne in mind that this arbitration proceeding was provided for by the contract of the parties made before bankruptcy, and actively entered upon before the adjudication. By its contract with the petitioner, the bankrupt enjoyed the right to have the question of whether certain specified articles were or were not to be furnished by it under its contract for the construction of ships, determined by an expert in such matters. The controversy was pending before him at the time of the adjudication. The trustee merely proceeded

with it in place of the bankrupt, as he was authorized to do under Sections 11-b and 11-c of the Bankruptcy Act. Section 70-a (3) of the Act provides that the trustee shall succeed to powers which the bankrupt might have exercised for his own benefit. Here was a power to have a controversy settled in a certain way, which the bankrupt was entitled to have enforced, and certainly the trustee, if he so elects, may take advantage of the same provision.

Suppose, for instance, that the trustee had brought suit against the petitioner upon its contract with the bankrupt. The trustee would have stood in the shoes of the bankrupt, and in adopting its contract, would be held to have accepted all of its conditions.

> Collier on Bankruptcy, 11th Ed., p. 1117-1120.
>
> "A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill."
>
> *In re Standard Laundry Co.*, 112 Fed. 126, (D. C. California).

The petitioner would not, in such a case, be prevented by the bankruptcy from insisting upon compliance with the provisions of the contract regarding arbitration. The trustee could be made to arbitrate the question before Captain Fowler. If bankruptcy would not affect the contract in that respect in that case, then it should not affect it in this case. If the trustee accepts the contract and

relies on the arbitration provision, there is certainly no reason why this petitioner should not be bound by it. It would, indeed, be a most astonishing travesty upon the administration of the law to permit this petitioner now to assail and impeach the decision of a tribunal created by its own solemn act and deed, recognized by its voluntary submission and besought for a favorable decision, and not objected to until after an adverse award was rendered. If Mr. Fowler's award had been favorable to the petitioner, it would not be complaining of this order. To permit it to do so when the award is adverse is to encourage speculation with the court contrary to all of the authorities. (See opinion of Judge Neterer in this matter, and authorities cited 284 Fed. 277 at page 281).

> "What kind of arbitration would it be, if each party, solemnly in writing pledging himself to its terms, could nevertheless destroy it by revocation after the real question in controversy were decided against him? * * *
>
> "The ethical impropiety of the defeated owner's revocation at such a stage in the proceeding is obvious and will not be sanctioned by a court except under the compulsion of rules of law clearly applicable."
>
> *Toledo S. S. Co. v. Zenith Transportation Co.*, 184 Fed. 391 at p. 396 (C. C. A. 6th Cir.)

We cannot conceive how the petitioner, upon any ground, can be permitted to overthrow this

allowance to Mr. Fowler. Indeed, it does not in its argument, make any specific reference to this particular item of allowance, but concerns itself primarily with attacking the allowances to respondents Burns and Dawson, as members of the board of arbitrators, selected under the provisions of the contract of December 18th, 1918, to pass upon the question of extras. Reference to the opinion of the district judge in adopting the special master's report, (284 Fed. 277) shows that it was the award of the board, rather than of Mr. Fowler, which was in dispute. Inasmuch as specific grounds of objection to this allowance are not set forth in the brief, we shall not discuss this matter further. It invites application of the rule that errors assigned but not discussed in the brief will be disregarded.

Consolidated Interstate-Callahan M. Co. v. Witkouski, 249 Fed. 833, (C. C. A. 9th Cir.) See p. 840.

Cisco v. Looper, 236 Fed. 336, (C. C. A. 8th Cir.)

Repauno Chemical Co. v. Victor Hdw. Co., 101 Fed. 948 (C. C. A. 8th Cir.)

Taking up now the allowances to Burns and Dawson, we desire to call attention in somewhat greater detail than is done in petitioner's brief, to what actually transpired.

Upon the reference to the special master, issues were joined upon petitioner's claim, one of the points raised being that under paragraphs eighteen

and seven of the contract upon which the claim was based, the differences between the parties, at least so far as concerned the question of extras claimed by the bankrupt against the petitioner, should be submitted to a board of arbitrators to be selected in accordance with the contract. The master ruled that the question of extras should be so submitted. Thereupon the trustee selected respondent Burns as an arbitrator; the petitioner selected an arbitrator, Mr. Frank Walker; and these two selected as the third member of the board the respondent Dawson. (Respondents' Answer, paragraphs I and II). Under the arrangement for holding the arbitration, it was understood and agreed that each party should pay the fees of the arbitrator selected by him, and one-half of the fees of the third arbitrator. (Record, p. 20). This board held numerous and lengthy hearings, examined a great amount of evidence, considered the case very thoroughly, and thereafter made an award upon the question of extras submitted to them, finding that the bankrupt was entitled to a credit against the petitioner for work done and materials furnished extra to its contract in the sum of $1,028,458.68. (Record, pp. 19 and 20). The referee certifies that

> "After said board was organized, both parties availed themselves of the services of said board, appeared before them, submitted evidence and participated in the proceedings throughout the inquiry until the said award

of said arbitrators was made and submitted." (Record, pp. 16 and 17).

It was expressly agreed by the petitioner that the amount allowed for the services of these arbitrators was reasonable compensation for what they had done. (Record, pp. 14, 17, 20; Record on Appeal, p. 42).

This award of the arbitrators was accepted by the master in arriving at his decision upon the liquidation of the claim, as establishing the amount of credit to be allowed the bankrupt on account of extras, and his report has been confirmed and adopted by the district court.

In re Patterson-MacDonald Shipbuilding Company, 284 Fed. 277.

Much of what we have said above in discussing the allowance to respondent Fowler applies also to these allowances, and conversely, a great deal of the argument as to the latter, is also relevant to the former item, and we respectfully ask that this be borne in mind and so considered.

The petitioner expressly limits itself (Petitioner's Brief, pp. 6 and 7) to the claim that the arbitration was void for failure to comply with Section 26 of the Bankruptcy Act, and General Order 33. The respondents submit that these requirements were substantially complied with, certainly beyond the point of any jurisdictional defect, and even if there were irregularities in the procedure, they were of a minor and unimportant character, to which neither the petitioner nor any other creditor

took objection at the time they occurred, and that the petitioner is least of all entitled to complain.

The scope of General Order 33 is administrative rather than jurisdictional, and is intended to inform and advise the court of the proceedings proposed to be taken by arbitration, as a basis for securing the court's consent thereto. The trustee, in his answer to petitioner's claim in liquidation, had set forth the facts upon which he based his claim for arbitration, and demanded it. Upon consideration of this point, the special master, who was also the referee, ordered arbitration to be had upon a specific question, to-wit: the amount of extras for which the trustee was entitled to credit against the petitioner under the contract. Now, whether we consider this liquidation proceeding as strictly a proceeding in bankruptcy, or on the other hand, as a separate proceeding, either an entirely independent one, or a controversy arising in the bankruptcy proceeding, the referee, who was the same person as the special master, was fully advised as to the point in dispute, and the trustee's request for arbitration. The information which General Order 33 was designed to provide, was furnished to him. Definite issues, if any were required, were settled by him, to-wit: extras under the contract.

The special master, who was also the referee, ordered arbitration upon the specific question of extras. Section 26 does not require a formal order, but simply the direction of the court. Under rule fifteen of the Bankruptcy Rules of the Circuit

Court, adopted by the District Court for the District of Washington, referees have all the power of the court of bankruptcy under general order of reference, except as to questions arising out of the application of bankrupts for composition discharge. When the referee, acting as special master in the liquidation proceeding, ordered the arbitration, that was sufficient direction to the trustee to justify his proceeding accordingly under Section 26.

Three arbitrators were thereupon chosen absolutely in conformity with Section 26-b, and the finding of the arbitrators, which, by the way, was unanimous, was thereafter filed with the special master and the referee. While the petitioner has claimed in his fourth specification of error that the awards are void on their face, it has not seen fit to bring the awards before this court. They are, however, in evidence, and included in the transcript on appeal from the order disallowing petitioner's claim, and respondents, for their part, would be very glad to have this court refer to and consider them, if it cares to do so.

The action of the referee and the creditors in making the allowances herein complained of, is a full and sufficient confirmation and ratification of the acts of the trustee respecting arbitration, to remove any question of irregularity in the procedure, from an administrative standpoint.

Shoe & Leather Reporter, et al., Petitioners,
129 Fed. 588 at p. 589 (C. C. A. 1st Cir.).

Had the petitioner desired to object at the time the arbitration was ordered, it should have then taken steps to review the order allowing arbitration, instead of proceeding in accordance therewith, submitting its case, and participating until the award, and objecting only when the award was rendered against it. It would be astounding for a court of equity to say that this petitioner, having submitted to an arbitration substantially in accordance with the statute, extending over a long period of time, involving many hearings and a large amount of money, and a corresponding amount of skill, time and attention on the part of all parties, should now, for unsubstantial irregularities, be able to avoid and set aside the entire proceeding. It seems clear that the provisions of Section 26-b and General Order 33 are purely of an administrative character, intended to guide the procedure, and that if there has been a substantial compliance therewith, one in the position of this petitioner has no ground for complaint.

So far as we can find from the reported cases, General Order 33 has never been cited, except once.

Petition of Baxter, 269 Fed. 344. (C. C. A. 6th Cir.)

That related to a composition, not an arbitration. The trustee's petition appears to have left certain matters to inference instead of setting them forth as required by the order, but the court held that

it was not for that reason jurisdictionally defective.

In

Grant v. National Bank of Auburn, 232 Fed. 201 (D. C. New York),

a trustee in bankruptcy submitted a controversy to what, as the court said (p. 210), was "little more than an arbitration." The decision was in favor of the trustee, and on appeal it appears to have been attacked on every possible ground. It does not appear that any compliance was had with the requirements of Section 26 and Rule 33, and yet no suggestion is made that the proceedings were in any way impaired or affected by failure to conform thereto.

Petitioner refers to

United States Fidelity & Guaranty Company v. Bray, 225 U. S. 205, 56 L. Ed. 1055,

and quotes at length therefrom in its brief (pp. 14 and 15). We are unable to see that this case has any application to the present discussion. There was presented a question of jurisdiction on the part of another court than the court of bankruptcy to control and decide upon the priority of distribution of funds belonging to the estate and held in the hands of the bankruptcy court. Obviously such jurisdiction was beyond the power of the court attempting to exercise it.

But this case presents no such feature. There is no attempt on the part of some other court to dictate to the bankruptcy court what claims it shall

allow, or how it shall distribute its funds. The determination of questions affecting the amount of petitioner's claim was not an interference with the jurisdiction of the court of bankrupt to pass on that claim and determine its status in the bankruptcy proceedings when presented for proof, whether those issues were decided by arbitration pursuant to the provisions of Section 26 of the Bankruptcy Act, or by liquidation proceedings under Section 63-b, which provides that they shall be "in such manner as the court may direct," and it has been held, may be carried on in any court of competent jurisdiction including the court of a state.

Collier on Bankruptcy, 11th Ed. p. 977.

In re United Button Co., 140 Fed. 495 (D. C. Del.).

In re Buchan's Soap Corporation, 169 Fed. 1017 (D. C. N. Y.).

In re Ellsworth, 277 Fed. 128 (D. C. Wn.).

Farish Co. v. South Side Trust Co., 281 Fed. 825 (C. C. A. 3rd Cir.).

In re Edelen, 248 Fed. 580 (D. C. Ky.).

In re Heim Milk Product Co., 183 Fed. 787 (D. C. New York).

In the last case the court said:

> "If unliquidated, as this claim seems to be, it may be liquidated by agreement *or arbitration*, if the trustee consents, or suit, as the court, that is, the referee, if the case has been referred, shall direct." (Our italics).

Certainly the *Bray* case can have no application here, where the entire proceedings were carried on under the direction and control of the referee in bankruptcy.

It is also claimed that the reference to a special master operated to prevent a submission of any question to arbitration, although the contract of the parties involved in the liquidation specifically provided for such submission. The first answer to this is that the petitioner, by acquiescing in the ruling directing arbitration as to extras, and proceeding in accordance therewith, is now estopped to question it. On October 26th, 1920, after hearing the arguments for and against the trustee's demand for arbitration upon the question of extras, the master ruled in favor thereof. At this point it was open to the petitioner, and was in fact, its duty, if it desired to contest this ruling, to then apply to the District Court for instructions to the master, reversing his ruling and withdrawing the matter of extras from arbitration, as, if petitioner was right, a long, difficult and expensive proceeding before the arbitrators would have been avoided.

> *Pennsylvania Steel Co. v. New York City Ry.*, 182 Fed. 155 at p. 160 (Circuit Court, S. D. New York).
>
> "If the master erred by an improper rejection of testimony offered by the defendant at the hearing before him, his error was one to be at once corrected by motion to the court for an order to compel him to receive the

evidence, and is not the subject of an exception to his report. *Schwarz v. Sears*, Walk. (Mich.) 19; *Ward v. Jewett*, Id. 45; *Nail Factory v. Corning*, 6 Blatchf. 333."

Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476 (Circuit Court, S. D. N. Y.).

See also:

In re Thomas, 35 Fed. 337 (S. C.)

Bates Refrigerating Co. v. Gillette, 28 Fed. 673 (N. J.)

In re Bacon, 159 Fed. 424 (C. C. A. 2nd Cir.).

In re Hollingsworth & Whitney Co., 242 Fed. 753 at 760 (C. C. A. 1st Cir.)

Instead of attempting to correct the error now alleged to have been made at that time, before the arbitrators were selected, the petitioner proceeded with the arbitration, which occupied several months, and as petitioner admits, involved services from the arbitrators of the reasonable value of $3,000 each. It presented its case and participated in the proceedings until the award, which was unanimous. It strove for a favorable decision on the merits of its contention, and had it been successful, it would, of course, now maintain that that proceeding was final and conclusive.

In the next place, Judge Neterer, who made the order of reference, intended no such limitation as is now contended for by petitioner, for he has approved by his decree, adopting and confirming the

report of the master, all that was done by the latter, including the submission to arbitration.

Finally, in answer to this contention, we submit that if the reference to the special master was under the Bankruptcy Act, as petitioner claims, then the provisions of Section 26 of the Act, authorizing such an arbitration, cover the case, and support the arbitration. If, on the other hand, the matter be regarded as a liquidation proceeding, outside of the bankruptcy court or bankruptcy proceeding, then the arbitration may be equally sustained by the contract of the parties. The master was bound to adjudicate the rights of the parties upon the same basis as the court, had it reserved to itself jurisdiction of the liquidation. If arbitration was demandable under the contract, the appointment of the master did not deprive either of the parties of the right thereto, but they were entitled to the enforcement of this provision from the master the same as from the court. Stipulations for arbitration, such as was here enforced, submitting a limited question to arbitration, and not ousting the jurisdiction of the court entirely, are valid and enforceable, and it was competent for the court to give effect to the provisions of the contract as a common law arbitration.

Munson v. Straits of Dover S. S. Co., 99 Fed. 787 (D. C. New York).

Memphis Trust Co. v. Brown-Kechum Iron Works, 166 Fed. 398 (C. C. A. 6th Cir.).

"Arbitrators are judges chosen by the par-

ties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity."

Burchell v. Marsh, 58 U. S. 344, 15 L. Ed. 96.

Burrell v. United States, 147 Fed. 44 (C. C. A. 9th Cir.).

School District v. Sage, 13 Wash. 352, 43 Pac. 341.

Zindorf Construction Co. v. Western American Co., 27 Wash. 31.

Herrin, Hall, Marvin Safe Co. v. Purcell Safe Co., 81 Wash. 592.

Dickey Mfg. Co. v. Sound Construction & Engineering Co., 92 Wash. 316.

Martin v Vansant, 99 Wash. 106.

After a final award, parties are bound by the arbitration.

5 Corpus Juris, 56, paragraph 103, and cases cited.

An award once made becomes conclusive upon the parties in the absence of a showing of fraud, undue influence or arbitrary action.

Burchell v. Marsh, supra.

Reedy v. Scott, 90 U. S. 352, 23 L. Ed. 109.

Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 29 L. Ed. 255.

Burrell v. United States, 147 Fed. 44 (C. C. A. 9th Cir.).

Toledo S. S. Co. v. Zenith Transportation Co., 184 Fed. 391 (C. C. A. 6th Cir.).

The courts will not allow a party to speculate upon the results of the arbitration. If he goes to trial before arbitrators, and takes his chances of a favorable award, he is conclusively bound by an award against him.

Hewitt v. Lehigh & H. River R. Co., 57 N. J. Eq. 511; 42 Atl. 325.

Bingham v. Guthrie, 19 Pa. 418.

Williams v. Branning Mfg. Co., 154 N. C. 205, 70 S. E. 290, 47 L. R. A. N. S. 337.

In his decision confirming the master's report (284 Fed. 277), Judge Neterer sustained the arbitration under the Bankruptcy Act, and suggested that under the decisions of the Supreme Court of the State of Washington, there could be no valid common law arbitration, and no statutory arbitration save through the medium of the state courts. But in this regard we respectfully submit that Judge Neterer overlooked the point that arbitration goes to the remedy and not to the right, and that in such matters the Federal Court is not governed by the laws or decisions of the states, but follows its own procedure, which, as the cases above establish, sanctions such arbitration as has been had in this case.

Hamilton v. Home Insurance Co., 137 U. S. 370, 34 L. Ed. 708.

United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006.

Meacham v. Jamestown F. & C. R. Co., 211

N. Y. 346; 105 N. E. 653; Ann. Cas. 1915 C. 851.

The Eros, 241 Fed. 186 (D. C. N. Y.).

If the reference to the special master was outside the bankruptcy proceeding, it was nevertheless in the federal court, and the arbitration is sustainable under the contract between the parties.

On review, the respondent may rely any ground disclosed by the record sustaining the decision.

Davis v. Crompton, 158 Fed. 735 (C. C. A. 3rd Cir.).

4 Corpus Juris, 661, paragraph 2556.

Petitioner has cited

District of Columbia v. Bailey, 171 U. S. 161, 43 L. Ed. 118, petitioner's brief, p. 17,

and a number of other cases, where the submission to arbitration was avoided because of want of authority of a party to enter into the contract. Such cases have no bearing here because the trustee as such had power to submit the controversy to arbitration under Section 26 of the Bankruptcy Act, while the contract between the parties providing for arbitration was made by the bankrupt when it was an active, going concern, with full power to make such a contract. Whether the arbitration be rested on the contract, therefor, or on the act of the trustee, it was, in either case, competently authorized.

We should not lose sight of the fact that these arbitrators were not parties to the bankruptcy pro-

ceeding, and it would be a harsh injustice to charge them strictly with notice of the technical legal complexities of the case, or the result thereof as bearing on their authority to act. All they knew was that they were employed by the trustee and the respondent to settle certain differences between the parties, as arbitrators. The petitioner did not raise with them the question of their authority. The arbitrators dealt with the parties on the basis on which the matter was submitted to them. They rendered their services in good faith, and it would be grossly unjust and inequitable to now refuse them what is admittedly just compensation for what they have done. The respondents urge that the petition be denied.

Respectfully submitted,

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